

Before the
MONTGOMERY COUNTY
COMMISSION ON COMMON OWNERSHIP COMMUNITIES

September 21, 1995

In the Matter of	x	
Robert J. Rappoport	x	
12446 Valleyside Way	x	
Germantown, Maryland 20874	x	
	x	
Complainant	x	
	x	
v.	x	Case No. 268-O
	x	
Carl Capraro, President	x	
North Lake Woods Homeowners	x	
Association, Inc.	x	
18211 Chalet Drive	x	
Germantown, Maryland 20874	x	
	x	
Respondent	x	

DECISION AND ORDER

The above-captioned case having come before the Commission on Common Ownership Communities for Montgomery County, Maryland, for hearing on May 17, 1995, pursuant to Sections 10B-5(i), 10B-9(a), 10B-10, 10B-11(e), 10B-12 and 10B-13 of the Montgomery County Code, 1994, as amended, and the duly-appointed Hearing Panel having considered the testimony and evidence of record, it is therefore, this 21st day of September, 1995, found, determined and ordered as follows:

BACKGROUND

On April 4, 1994, Robert J. Rappoport, ("Complainant") owner of 12446 Valleyside Way, Germantown, Maryland 20874, a lot in the North Lake Woods Homeowners Association, Inc. ("Association" or "Board"), filed a complaint with the Office of Common Ownership Communities in which it was alleged that: a). the Association improperly denied his request that his storage shed be "grandfathered" under guidelines which were adopted after the shed was installed, and b). since the adoption of the Guidelines, the Association has acted in an inconsistent and selective manner in enforcing them with respect to metal sheds erected by other property owners which are similar to the one he installed. For relief, Complainant asks that the metal storage shed erected on his property in June, 1990, be allowed to remain in its current design and location on his property.

By letter dated, September 2, 1994, counsel for the Association, Thomas C. Schild, filed a response which alleged that: a). at the time Complainant's shed was erected, such storage sheds were prohibited by Article VII of the Declaration, without specific approval of the Association, which was never obtained; b). the Complainant's shed when erected did not comply with the Declaration; c). the Association had commenced enforcement proceedings against three other owners cited by Complainant, and in a fourth case had caused removal of the shed; and, d). the Association, in seeking to ensure architectural harmony as to storage sheds, had properly exercised its business judgment. Respondent requested that the Commission order the Complainant to remove the shed.

Since the matter was not resolved through mediation, this dispute was presented to the Commission on Common Ownership Communities for action pursuant to Section 10B-11(e) of the Montgomery County Code, 1994, as amended, on January 4, 1995. The Commission found that this dispute comes within Section 10B-8 and voted to take jurisdiction of the dispute; the hearing was scheduled for Wednesday May 17, 1995.

FINDINGS OF FACT

Based on the testimony and evidence of record, the Panel makes the following Findings of Fact:

- 1) Complainant, Robert J. Rappoport, owns the property at 12446 Valleyside Way, Germantown, Maryland, which is within the community of the North Lake Woods Homeowners Association, Inc.
- 2) The Association is a Maryland corporation, which through its governing body and organic documents including the Declaration of Covenants, governs a community consisting of 310 townhouse units.
- 3) The Declaration of Covenants of the Association (the "Declaration") states in pertinent part:

Section 1. Architectural and Environmental Review Committee.

Except for construction or development by, for or under contract with the Declarant, and except for any improvements to any lot or to the common areas accomplished by the Declarant concurrently with said construction and development and except for purposes of proper maintenance and repair, no building, fence, wall or other improvements or structures shall be commenced, directed, placed, moved altered or maintained upon the property, nor shall any exterior addition to or change (including any change of color) or other alteration thereupon be made until the complete plans and specifications showing the location, nature, shape, height, material, color, type of construction and any other proposed form of change, including, without limitation, any other information specified by the Architectural and Environmental Review Committee (henceforth "AERC") shall have been submitted to and approved in writing as to safety, harmony of external design, color and location in relation to surrounding structures and topography and conformity with the design concept for the community by an Architectural and Environmental Review Committee designated by the Board of Directors.

Section 7. Prohibited Uses and Nuisances. Except for activities of the Declarant during the construction or development of the community, or except with the prior written approval of the Board of Directors of the Association or the Architectural and Environmental Review Committee, or as may be necessary in connection with reasonable and necessary repairs or maintenance to any dwelling or upon the common areas:

.....

(j) no structure of a temporary character, and no trailer, tent, shack, barn, pen, kennel, run, stable, outdoor clothes dryer, shed or other buildings shall be erected, used or maintained on any lot at any time.

4) The Declaration of Covenants, dated November 25, 1983, was recorded among the Land Records of Montgomery County, Maryland on November 28, 1983.

5) Complainant settled on and acquired title to his residence in April, 1988.

6) Complainant applied for permission to construct a deck in April 1989 and received approval from the Board acting as the Architectural and Environmental Review Committee.

7) In June, 1990, Complainant erected a metal shed beneath the deck at the rear of his property. On cross examination, Complainant acknowledged that the shed was installed prior to his application for approval for it. Complainant was advised by letter from the Association, that an "Architectural Change Request" form is required to build a metal shed (Commission's Exhibit 1A).

8) On June 18, 1990 Complainant applied for permission to erect and maintain an 8'x 6' aluminum shed, which "will be the exact model, size and color as the storage shed built on the property at 12460 Valleyside Way." (Commission Exhibit 1 at Exhibit 1B).

9) On July 24, 1990, the Association, through its property management company (the "PM"), informed Complainant that his request had been denied because the proposed shed must be built of treated lumber, not aluminum, and must not exceed the maximum height of the fence on the applicant's property. This letter, Commission Exhibit 1 and Exhibit 1D, suggested that the applicant resubmit as quickly as possible so that the Board might review the re-submission at its next meeting scheduled for August 27, 1990. There is no dispute that the walls of the shed are aluminum siding, not treated lumber, and that the height of the shed is greater than six feet, which is the maximum height of Complainant's wood fence. (See Respondent's Exhibit R-3.)

10) By letter, dated October 9, 1990, which was based upon the denial by the Board, the PM informed Complainant that he had installed a non-complying storage shed and that the shed must be removed within fifteen (15) days. In the same letter, the PM observed that Complainant was constructing a patio in his back yard without submitting an Architectural Application for it, and enclosed an application for the patio.

11) By letters dated June 18, 1993 and August 9, 1993, the PM requested the Complainant to remove the storage shed.

12) The record indicates that the Complainant never re-submitted an application to erect and maintain the storage shed.

13) On November 24, 1993, counsel for Respondent demanded that Complainant remove the shed before December 15, 1993, or suit would be filed to enjoin the continuing violation of the Covenants by Complainant.

14) In March, 1994, Respondent filed such a suit against Complainant. As stated above, on April 4, 1994, Complainant filed a complaint with the Commission, which resulted in a voluntary stay in the litigation.

15) The Association circulated draft General Architectural Guidelines for the Association during the Summer of 1991. On September 5, 1991, the PM gave notice to the homeowners that the Guidelines had been amended based on this review by the community. (Commission's Exhibit 1 at Exhibit G). On September 16, 1991, the Guidelines, as amended, were adopted by the Board of Directors. (Commission Exhibit 1, Exhibit H).

16) The adopted Guidelines restated the Declaration of Covenants at Article VII, Section 1 which are quoted at Finding of Fact No. 3 above. Pertinently they also state:

V. Storage Buildings/Sheds

1. Requests for the construction of storage buildings or sheds must be submitted to the Architectural Committee for approval and shall contain a picture and/or drawing and a description of the proposed building.

2. Construction should be of Texture 1-11 wood or pressure treated lumber only. The shed may not exceed six (6) feet in height.

3. The roofing should be the same color and material as that of the house.
(Respondents Exhibit R-1).

17) By letter, dated July 1, 1993, to the PM, Complainant acknowledged that he received a set of the proposed Architectural Guidelines for the community in early 1991, and that he received a letter, dated September 5, 1991, announcing that they would be adopted after the Board of Directors meeting on September 16, 1991. Complainant did not submit evidence that he (i) participated in the formulation of the Guidelines or, (ii) requested that the Guidelines be amended to permit tool sheds to be constructed with aluminum.

18) As stated in Finding of Fact No. 8 above, the Complainant's design for a shed was modeled upon that of Mr. and Mrs. Herman Stewart at 12460 Valleyside Way, Germantown, MD 20874. On cross examination, Complainant stated that he did not check the records of the Association or the PM to verify that the Stewarts' shed was approved by the AERC.

19) By letter, dated June 18, 1993, the PM cited the Stewarts for maintaining a metal shed and requested that the Stewarts' remove the shed within fifteen (15) days. (Commission Exhibit 8A). By letter to the PM, dated July 1, 1993, the Stewarts requested that their shed be grandfathered. (Respondent's Exhibit R-4). By letter, dated August 9, 1993, the PM responded that the

Stewarts' request for grandfathering was denied, and that the shed must be removed. (Commission Exhibit 8B). By letter, dated November 24, 1993, the attorney for the Respondent requested the shed be removed before December 15, 1993 (Commission's Exhibit 8C). These actions and dates for enforcement correspond with those taken with respect to the shed of Complainant. As a result of these actions, the shed belonging to the Stewarts was removed, according to the testimony of Patrick Gloyd, a representative of the PM.

20) As stated in the first paragraph of the Background Section of this Decision, the date of filing of the Complaint by Complainant was April 4, 1994. In an attachment to the Complaint, Complainant refers to metal sheds located at 12466 Valleyside Way (Northrup), 12573 Cross Ridge Drive (Healy) and 43 Cross Ridge Court (Steiner), which were allowed to stand by the AERC.

21) Mr. Gloyd testified that the Association first learned of these three (3) metal sheds from the contents of Mr. Rappoport's Complaint, dated April 4, 1994. The record indicates that by letters, each dated May 10, 1994, the PM notified each of the three (3) remaining homeowners cited by Complainant in his Complaint (Northrup, Healy and Steiner), that metal sheds had been identified on their respective property without any application or approval for such shed. The letter to each owner then requests submittal to the AERC for approval. (Commission's Exhibit 8D - Northrup, 8E -Healy, and Respondent's Exhibit R-6 -Steiner).

22) Mr. Gloyd testified that after investigating the facts and circumstances related to the Steiner and Healy sheds, the Board concluded that the respective sheds were erected prior to the Association taking control of the community and prior to the current owners' acquisition of the property. On this basis, and to a lesser extent due to the harmony of design of each shed with the respective residence (Complainant's Exhibit C-4 - Steiner and C-5 - Healy), the Board allowed the metal sheds of Steiner and Healy to remain.

23) The metal shed at 12466 Valley Side Way (Northrup) was removed in August, 1994 in response to the enforcement action taken by Respondent described in Finding of Fact No. 21.

24) According to Mr. Gloyd, the role of the Architectural Guidelines is to further define or clarify the provisions of the Declaration without contradicting them, and that some Associations for whom Mr. Gloyd works make architectural decisions based solely upon the Declaration without adopting architectural guidelines.

25) Ms. Euginia Christie, a member of the Board for six (6) years, testified that the Board has never, before or after adopting the Architectural Guidelines in September 1991, approved an application for construction of a metal shed. The metal sheds located at the Steiner and Healy homes were constructed by the developer prior to the Association taking control.

26) On cross examination, Ms. Christie acknowledged that from viewing the sheds around the community, one could observe metal as well as wood sheds, and that one might conclude from such field observation, without further inquiry, that metal sheds were acceptable within the community.

CONCLUSIONS OF LAW

The Commission concludes, based on a preponderance of the evidence, including but not limited to, testimony and documents admitted into evidence and after full and fair consideration of the evidence of record that:

GRANDEATHERED COMPLIANCE

- 1) Complainant had notice of the terms and conditions of the Declaration of Covenants.
- 2) The Declaration does not permit structures, such as metal sheds or decks, without the prior written approval of the AERC. As stated in Finding No. 3, the AERC must approve of change requests based on safety and harmony of external design with the surrounding community.
- 3) Complainant is familiar with and has followed the procedure and requirement for obtaining prior approval of architectural changes with respect to his application to construct a deck in April 1989. Complainant may not now assert that he is unfamiliar with these procedures for obtaining prior approval of architectural changes pursuant to the Declaration of Covenants.
- 4) Complainant cannot be heard to assert his compliance with the requirements in effect prior to adoption of the Guidelines, where he first erected the metal shed, in violation of the Declaration, then sought approval which was denied, was invited to reapply with guidance as to what would gain approval and then failed to do so and where he proposed plans, which were an exact model of a neighbor's shed, without conducting due inquiry as to whether the neighbor's shed was lawfully approved.
- 5) The absence of specific standards and criteria in the Declaration for evaluating a request to construct a tool shed does not, without more, entitle Complainant to be grandfathered. The principles stated in the Declaration which appear at Finding of Fact No. 3 concerning harmony and safety are sufficient guidelines for the Association to make a determination on a request for architectural change.
- 6) Based solely on the Declaration, without adopting architectural guidelines, the Association is entitled to make architectural change decisions on a case by case basis as long as such decisions are made in good faith without being arbitrary. We think the decision by the Association to require that sheds be constructed with pressure-treated lumber and that they not exceed the maximum height of the property line fence was a reasonable determination, as applied to Complainant, and was within the authority granted to the Association by the Declaration.
- 7) Complainant misunderstands the role of the Architectural Guidelines. There is no requirement that the Association adopt these in order to regulate the construction of sheds or decks, such as those of the Complainant. The Guidelines are prepared and published to give guidance and clarity to homeowners as to which architectural changes will be acceptable.

INCONSISTENT ENFORCEMENT

- 8) Based on Findings of Fact Nos. 18-23, it is our conclusion that the enforcement action taken by the Association against Stewart and Complainant occurred in the same time period and that similar actions were taken by the Board in each case in order to compel the removal of metal sheds.

9) With respect to the other metal sheds, the Association investigated and took action against each of them within one month of learning about them from Complainant.

10) The Association has consistently taken administrative and enforcement action when it has learned of the existence of metal sheds within the community, whether from Complainant or from its own sources. The only exception to this appears with respect to the discovery, after investigation by the Association, that certain sheds were installed prior to the Association taking control of the community or by a prior homeowner. Since enforcement against owners of these sheds may raise the equivalent of due process or retroactivity problems, we conclude it is a reasonable exercise of the discretion of the Board not to pursue these matters. Also, the Board could reasonably conclude that given their smaller size and design, as distinct from that of the Complainant, that the Steiner and Healy sheds met it's architectural standards for harmony. By it's actions, the Association has made patently clear that with the narrow and reasonable exception noted above, metal sheds in place now or to be installed in the community are contrary to it's standards, and that the Association will take enforcement action against them.

11) Article XII Section 3 of the Declaration provides that any failure or forbearance by the Association to enforce any covenant shall not be deemed a waiver. On these facts we do not find any waiver or intent to abandon by the Association its right to enforce the architectural requirements stated in the Declaration.

12) The Maryland courts have applied the business judgment rule to the decisions of homeowners associations. Applying that rule, we will not interfere in the internal affairs or decisions of a homeowner's association if there is no allegation of fraud, bad faith or self dealing. Black et ux. v. Fox Hills North Community Association, Inc. 90 Md. App. 75, 599 A. 2d 1228 (1992). We conclude that the Board acted reasonably and consistently in the exercise of its enforcement discretion under this rule.

ORDER

In view of the Findings and Conclusions set forth above, it is, on this 21st day of September, 1995, hereby ORDERED by the Commission that the Complainant shall have thirty (30) days from the date of this Order to permanently remove the existing metal shed from his property.

The foregoing was concurred in by Panel members, Alper, Fox and Gick.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland, within thirty (30) days from the date of this Order, pursuant to the Maryland Rules of procedure governing administrative appeals.



Richard S. Alper
Panel Chair,
Commission on Common Ownership